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LYNAWATI ABDULLAH v. ABANG SUKORI ABANG HJ GOBIL & ANOR

COURT OF APPEAL, KUCHING
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: Q-01-203-05-2013]
29 JULY 2015
[2015] CLJ JT(10)

C ***ADMINISTRATIVE LAW:*** *Judicial review – Certiorari – Application for – Native customary rights land – Land acquired by State Government of Sarawak – Dispute over ownership of land and compensation – Native Court of Appeal held that applicant was not rightful owner of land – Application for judicial review to quash decision of Native Court of Appeal – Whether decision of Native Court of Appeal* D *amenable to judicial review by High Court – Rules of Court 2012, O. 53*

CIVIL PROCEDURE: *Judicial review – High Court – Powers of High Court – Dispute over ownership of land and compensation – Native Court of Appeal held that applicant was not rightful owner of land – Application for judicial review to quash decision of Native Court of Appeal – Whether decision of Native Court of Appeal* E *amenable to judicial review by High Court – Rules of Court 2012, O. 53*

Six parcels of native customary rights land had been acquired by the State Government of Sarawak for the purpose of building a public road. Both the appellant and the first respondent claimed ownership over the disputed parcels of land and claimed for compensation from the State Government. F The dispute between the appellant and the first respondent culminated into a series of proceedings in the Native Courts and finally, the Native Court of Appeal of Sarawak ('NCA') held that the appellant was a non-native and that the first respondent was the rightful owner of the disputed parcels of land. Aggrieved by the decision of the NCA, the appellant applied *ex parte* to the G High Court for leave to file a judicial review application pursuant to O. 53 of the Rules of Court 2012 ('ROC') with a view of obtaining an order of *certiorari* to quash the decision of the NCA. The High Court dismissed the application, ruling that a decision of the NCA is not amenable to judicial review. Hence, the present appeal. The appellant submitted that a decision H of the NCA is amenable to judicial review, based on the decision of the Supreme Court in the case of *Hj Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang*.

Held (allowing appeal; setting aside decision and remitting matter back to High Court)

I **Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:**

(1) The decision of the NCA was amenable to judicial review by the High Court. The Native Courts of Sarawak are established by the state law of Sarawak under Item 13 of List IIA of the State List for Sabah and

Sarawak in the Ninth Schedule of the Federal Constitution. They are, like the Native Courts of Sabah, *vis-a-vis* the High Court of Sabah and Sarawak, inferior tribunals. Like other inferior tribunals, the High Court may exercise control over the Native Courts through prerogative orders. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Enam bidang tanah hak anak negeri telah diperolehi oleh Kerajaan Negeri Sarawak bagi tujuan pembinaan jalan awam. Kedua-dua perayu dan responden pertama mendakwa bahawa mereka mempunyai hak milik ke atas bidang-bidang tanah yang dipertikaikan tersebut dan menuntut pampasan daripada Kerajaan Negeri. Pertikaian antara perayu dan responden pertama memuncak menjadi satu siri prosiding di Mahkamah Anak Negeri dan akhirnya, Mahkamah Rayuan Anak Negeri Sarawak ('MRAN') memutuskan bahawa perayu bukanlah anak negeri dan responden merupakan pemilik yang berhak ke atas bidang-bidang tanah yang dipertikaikan. Terkilan dengan keputusan MRAN, perayu memohon secara *ex parte* kepada Mahkamah Tinggi bagi kebenaran untuk memfailkan permohonan semakan kehakiman di bawah A. 53 Kaedah-kaedah Mahkamah 2012 ('KKM') untuk mendapatkan perintah *certiorari* bagi membatalkan keputusan MRAN. Mahkamah Tinggi menolak permohonan tersebut dengan memutuskan bahawa keputusan MRAN tidak terbuka kepada semakan kehakiman. Oleh itu, rayuan ini. Perayu menghujahkan bahawa keputusan MRAN adalah terbuka kepada semakan kehakiman berdasarkan keputusan Mahkamah Agung dalam kes *Hj Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang*.

Diputuskan (menolak rayuan; mengenepikan keputusan dan mengembalikan hal perkara ke Mahkamah Tinggi)
Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Keputusan MRAN adalah terbuka kepada semakan kehakiman oleh Mahkamah Tinggi. Mahkamah-mahkamah Anak Negeri Sarawak diwujudkan oleh undang-undang negeri Sarawak di bawah Item 13, Senarai IIA bagi Senarai Negeri Sabah dan Sarawak, Jadual Kesembilan, Perlembagaan Persekutuan. Kesemuanya adalah, seperti Mahkamah Anak Negeri Sabah, *vis-a-vis* Mahkamah Tinggi Sabah dan Sarawak, tribunal bawahan. Seperti tribunal-tribunal bawahan yang lain, Mahkamah Tinggi boleh menjalankan seliaan ke atas Mahkamah-Mahkamah Anak Negeri melalui perintah-perintah prerogatif.

Case(s) referred to:
Hj Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang [1988] 1 LNS 147 SC ***(foll)***
Ongkong Anak Salleh v. David Panggau Sandin & Anor [1982] 1 LNS 92 HC ***(refd)***

Legislation referred to:
Native Courts Ordinance 1992 (Sarawak), s. 20
Rules of Court 2012, O. 53

For the appellant - Simon Siah Sy Jen (Chua Kuan Ching with him); M/s Baru Bian & Co Advocs

For the respondents - Nur Azhar Bujang (Mcwillyn Jiok with him); State Legal officers, AG's Chambers

[Editor's note: For the High Court judgment, please see Lynawati Abdullah v. Abang Sukori Abang Hj Gobil & Anor [2014] 8 CLJ 527.]

Reported by Najib Tamby

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

[1] This appeal deals with this question: whether a decision of the Native Court of Appeal of Sarawak is amenable to judicial review by the High Court?

[2] The High Court of Sabah and Sarawak at Kuching ('the High Court of Kuching'), on 15 April 2013, agreeing with the respondents' submission before it, answered this question in the negative and refused to grant leave to the appellant to file an application for judicial review.

[3] In refusing to grant leave, the High Court did not hear the leave application on the merits. The High Court merely ruled that it had no jurisdiction to hear the *ex parte* application on the ground that the decision of the Native Court of Appeal was not amenable to judicial review by the High Court.

[4] Hence the present appeal to this court by the appellant.

[5] On 17 April 2015, after hearing submissions, we unanimously allowed the appeal, but with no order as to costs.

[6] In allowing the appeal, we ruled that a decision of the Native Court of Appeal is amenable to judicial review by the High Court.

[7] We now give our reasons for so holding.

Facts Of The Case

[8] The appellant, Lynawati binti Abdullah, is of mixed parentage: her father is Chinese, and her mother, a Bidayuh. On 24 January 1983 she married a Sarawak Malay, one Jalal bin Mohi. Upon marriage, she converted to Islam. She faithfully practised the Islamic faith, observed Malay customs and speak Malay. The appellant thereafter applied to the District Native Court under s. 20 of the Native Courts Ordinance, 1992 of Sarawak for a determination that she is a native Malay of Sarawak. She succeeded in

her application. Her status as a native Malay of Sarawak was published in the Sarawak Government Gazette vol. LX No. 29 on 21 July 2005 *vide* gazette notification No. 2279. A

[9] The appellant is involved in a dispute with the first respondent, Abang Sukori bin Abang Haji Gobil, over the ownership of six parcels of native customary rights land situated in Kuching north land district ('the disputed parcels of land'). B

[10] The disputed parcels of land had been acquired by the State Government of Sarawak for the purpose of building a public road. Whoever was the rightful owner of the disputed parcels of land is entitled to compensation from the State Government. Both the appellant and the first respondent claim ownership over the disputed parcels of land. Both are claiming compensation. C

[11] The appellant claims that she had acquired the disputed parcels of land from their original Malay owners based on the custom of serah (that is, transfer) on payment of sagu hati (that is, compensation). D

[12] The dispute between the appellant and the first respondent over the ownership of the disputed parcels of land culminated in a series of proceedings in the Native Courts. First, there was the trial before the Chief's Court, Kuching. The Chief's Court decided in favour of the appellant. E

[13] The first respondent, dissatisfied with the decision of the Chief's Court, appealed to the Chief's Superior Court, at Kuching. But his appeal was dismissed.

[14] Still dissatisfied, the first respondent took the matter further by appealing to the District Native Court, Kuching. The District Native Court allowed his appeal and overturned the decisions of the Chief's Court and the Chief's Superior Court. F

[15] In allowing the first respondent's appeal, the District Native Court held that the appellant was not a native of Sarawak ('a non-native') at the time when she acquired the disputed parcels of land in the year 2000, as she was gazetted as a native Malay of Sarawak only on 21 July 2005; and thus she had no locus in any action before a Native Court. The District Native Court declared the proceedings before the Chief's Court and the Chief's Superior Chief's Court null and void. G H

[16] Dissatisfied with the decision of the District Native Court, the appellant appealed to the Resident's Native Court at Kuching. The Resident's Native Court dismissed her appeal and upheld the decision of the District Native Court that the appellant was a non-native and that the first respondent was the rightful owner of the disputed parcels of land. I

[17] The appellant then appealed to the Native Court of Appeal at Kuching, but her appeal was dismissed.

[18] Thereafter, being aggrieved by the decision of the Native Court of Appeal, in dismissing her appeal, the appellant applied *ex parte* to the High Court of Kuching for leave to file a judicial review application pursuant to O. 53 of the Rules of Court 2012 with a view to obtaining an order of *certiorari* to quash the decision of the Native Court of Appeal.

[19] Several grounds were advanced by the appellant in her judicial review application, one of which is that the Native Court of Appeal erred in law in holding that she was a non-native. But we are not concerned with the merits of the judicial review application for the purpose of this appeal.

[20] Although the application was *ex parte*, the learned High Court Judge, taking the view that the matter raised a "novel and interesting point of law", on her own volition, directed that the application be served on the respondents; and the latter were invited to make submissions. The State Legal Officer on behalf of the respondents did submit before the High Court.

[21] The High Court of Kuching, having heard parties, refused to grant leave to the appellant to apply for judicial review, ruling that a decision of the Native Court of Appeal is not amenable to judicial review.

The Structure Of Native Courts In Sarawak

[22] In a nutshell, in Sarawak, in addition to the civil courts and the Syariah Courts, there are the Native Courts. The Native Courts comprise of six tiers, namely:

(i) Native Court of Appeal (the highest in the hierarchy);

(ii) Resident's Native Court;

(iii) District Native Court;

(iv) Chief's Superior Court;

(v) Chief's Court; and

(vi) Headman's Court (the lowest in the hierarchy).

[23] The Native Courts deal with:

(i) cases arising from a breach of native law or custom where all the parties are subject to the same native system of personal law;

(ii) cases arising from a breach of native law or custom relating to any religious, matrimonial or sexual matter where one party is a native; and

(iii) other cases where jurisdiction is conferred upon the Native Courts by written law.

[24] However, the administration of the native law and custom in Sarawak by the Native Courts is subject to certain restrictions. The law provides that the Native Courts have no jurisdiction in respect of any cause or matter that falls within the jurisdiction of the Syariah Courts or the civil courts. With

regard to criminal offences, the power to impose punishment is restricted by a federal law: the Native Courts (Criminal Jurisdiction) Act 1991 ('the Act'). The Act only confers jurisdiction on the Native Courts of Sabah and Sarawak to try any offence (relating to native law and custom) punishable with a term of imprisonment not exceeding two years or with a fine not exceeding RM5,000 or a combination of both. The Act further provides that criminal jurisdiction cannot be exercised by the Native Courts in respect of an offence which is also an offence under the Penal Code.

[25] The Sarawak Native Courts Ordinance 1992 provides for the structure of the Native Courts system of Sarawak. The relevant provisions are as follows:

> Courts to which appeal lies
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> 13.-(1) An appeal shall lie:
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> (a) from the Headman's Court to the Chief's Court;
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> (b) from the Chief's Court to the Chief's Superior Court: Provided that the decision of the Chief's Superior Court in respect of all matters under section 5 (except land disputes under section 5(3)) shall be final and conclusive and shall not be a subject of appeal to the District Native Court or Resident's Native Court or Native Court of Appeal;
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> (c) subject to subsection (2), from the Chief's Superior Court to the District Native Court;
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> (d) from the District Native Court to the Resident's Native Court which shall be constituted by a person for the time being holding or acting in the office of Resident of a Division sitting with not less than two but not more than four assessors who shall be persons whom the Resident has reason to believe are versed in the customary law relevant to the determination of the appeal:
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> Provided that for the purpose of the speedy despatch of the business of the Resident's Native Court, the Yang Di-Pertua Negeri may appoint any person who has held office as Resident in the State, or such person as he may deem fit or proper to preside in the Resident's Native Court; and the person so appointed may exercise all or any of the powers conferred on a Resident by this Ordinance;
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> (e) from the Resident's Native Court, by way of petition for revision to the Native Court of Appeal constituted by subsection (3).
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> (2) No appeal shall lie to the District Native Court from the decision of any lower court in any cause or matter where the judgment or order relates to any case referred to in section 5(1) and (2).
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> (3)(a) There shall be a Native Court of Appeal which shall consist of:
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> (i) a President, who shall be appointed by the Yang di-Pertua Negeri;

A (ii) the President of the Majlis Islam or the Ketua Majlis of Majlis Adat Istiadat Sarawak;

(iii) any person who is or has been appointed a Temenggong and nominated by the President in consultation with the Chief Registrar, to sit in connection with the hearing of any particular appeal:

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Provided that where any of the persons specified in subparagraph (ii) is not able to sit as a member of the Native Court of Appeal in any particular case, the President shall, after consultation with the Chief Registrar, nominate a Temenggong to replace him.

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(b) No person shall be appointed to preside over a Native Court of Appeal unless he is holding or has held the office of a Judge of the High Court or is qualified under the Federal Constitution to be appointed as a Judge of the High Court.

D (c) The President of the Native Court of Appeal may be appointed for such period as may be stipulated in the instrument of appointment and may be paid such remuneration and allowance as may be determined by the Yang di-Pertua Negeri: Provided that no person shall be so appointed for a period exceeding three years but he is eligible for re-appointment.

E (d) Proceedings before a Native Court of Appeal may be regulated by rules made by the Yang di-Pertua Negeri under section 29.

(e) The Native Court of Appeal shall have jurisdiction to hear and determine all appeal cases which are still pending before such Court, including those cases filed after the 1st day of June, 1993.

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(4) Any person appointed to preside in a Resident's Native Court under the proviso to subsection (1)(d) or in a Native Court of Appeal under paragraph (a) of the proviso to subsection (3) shall be paid such remuneration and allowances as may be prescribed by rules made under section 29.

G Power of the appellate court

14.-(1) The appellate court may:

(a) dismiss the appeal;

(b) hear the case itself or order the case to be heard by any lower court;

H (c) hear further evidence, or order the court of first instance, or any other Native Court having jurisdiction, to hear further evidence;

(d) order a re-trial;

(e) set aside, reverse, amend or vary the decision of the lower court, however, the decision as altered shall not be in excess of the jurisdiction of the court of first instance; or

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(f) make such other order as it may deem just.

(2) Sections 23 and 24 shall apply to a Resident's Native Court but shall not apply to the Native Court of Appeal which shall, in respect of all such matters, have the same powers as may from time to time be vested in the High Court.

The Appellant's Submission

[26] Encik Simon Siah, learned counsel for the appellant, submits before us that a decision of the Native Court of Appeal is amenable to judicial review based on the decision of the Supreme Court in *Hj Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang* [1988] 1 LNS 147; [1988] 2 MLJ 85. In this case Hashim Yeop A Sani SCJ (as he then was), delivering the unanimous decision of the Supreme Court (the other two members of the panel comprising Salleh Abas LP and Seah SCJ), held:

> The underlying principle should always be remembered that the jurisdiction of the High Court to grant an order of *certiorari* is supervisory in character and is exercisable over all inferior tribunals. The Native Courts are creature of statute and the High Court can exercise control over the Native Courts through the prerogative orders. Also as Hickling said in his book *Malaysian Law* at p. 70:
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> > Such a control is important, since it is essential to have one supreme authority in any field of human activity. As English history illustrates, two systems of courts with parallel authority cannot exist together in harmony.

Respondents' Submission

[27] The learned State Legal Officer, Encik Nur Azhar bin Bujang, on behalf of the respondents, on the other hand, submits that the decision of the Native Court of Appeal is not amenable to judicial review. He relies on the High Court case of *Ongkong Anak Salleh v. David Panggau Sandin & Anor* [1982] 1 LNS 92; [1983] 2 MLJ 419. In this case cited, Seah J (as he then was; interestingly, five years later His Lordship sat as a Supreme Court Judge in *Hj Laugan Tarki*) held:

> The Native Courts are purely a creature of statute, *viz*. the Native Courts Ordinance (Cap. 43); their jurisdiction is clearly defined by the legislature and the powers of the courts are strictly limited. In short, the Native Courts including the District Native Court are statutory courts established not by federal law but by Sarawak State law. They administer a system of laws entirely different from that of the High Court and the subordinate courts in Sarawak. There is no right of appeal from a decision of the District Native Court to the High Court but under section 8(1)(c) of the Native Courts Ordinance an appeal lay to the Resident's Native Court which shall be constituted by a person for the time being holding or acting in the office of Resident of a division sitting with a Native Officer or Chief and two assessors, being persons whom the Resident has reason to

believe are versed in the customary law relevant to the determination of the appeal. Subject to subsections (3) and (4) thereof an appeal by way of case stated on a point of law or native custom lay from the Resident's Native Court to the Native Court of Appeal presided by a Judge of the High Court nominated by the Yang di-Pertua Negeri.

The phrase "any court subordinate to the High Court" contained in section 44(1) of the Specific Relief Act 1950 is of course different from the expression "subordinate court" as defined in section 3 of the Courts of Judicature Act 1964. In my opinion, a court cannot be said to be subordinate to the High Court unless the High Court exercises supervisory power over it. Moreover, the District Native Court is constituted under the Native Courts Ordinance (Cap. 43) a state law enacted by the legislature of Sarawak and the High Court has no supervisory power over it. Besides, an appeal from a decision of the District Native Court does not lie to the High Court but to the Resident's Native Court.

For the above reasons I am inclined to agree with the submission of the learned Assistant Attorney-General of Sarawak that the High Court has no jurisdiction to entertain this motion of the applicant. I therefore dismiss the Notice of Motion with costs to the 1st respondent only to be taxed. I make no order for costs in favour of the 2nd respondent.

Decision Of The High Court

[28] In holding that the decision of the Native Court of Appeal is not amenable to judicial review by the High Court, the learned High Court Judge opined:

Secondly, the constitution of the Native Court of Appeal under the Sabah Enactment has made it on par with the High Court for it provides that a Judge of the High Court or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. In Sarawak, there is only a slight difference to the constitution of the Native Court of Appeal in that its President is not only a High Court Judge but one who has held or is qualified under the Federal Constitution to be appointed as a High Court Judge (see section 13(3)(b) of the Native Courts Ordinance, 1992). Given the constitutions of the Native Court of Appeal in both States, these appellate courts are not 'inferior courts' upon which the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native Courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal if every dissatisfied native litigant at the subordinate court level could run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain.

Thirdly, a comparison can be drawn between the Native Court of Appeals in both states to the Election Court established under the Election Offences Act 1954. An election judge is specified in section 33 of that legislation as the Chief Judge or a High Court Judge nominated by him for that purpose. The courts have been consistent in their view that a

decision of an Election Judge is not amenable to judicial review by the High Court (see, for instance, the decision of the Court of Appeal in *Yong Teck Lee v. Harris Mohd Salleh & Ors* [2002] 3 MLJ 230 and for which leave to appeal to the Federal Court was refused). This [is] on account that it is presided by a Judge of co-ordinate jurisdiction with the High Court and is therefore not an inferior court. This same reasoning, in my view can be raised for the Native Court of Appeal.

...

Conclusion

The Supreme Court in *Haji Laugan*'s case quoted page 70 of Hickling's book, *Malaysian Law* in which the learned author justified the control of the High Court over Native Courts by saying that such a control is important since it is essential to have one supreme authority in any field of human activity. As English history illustrates, continues the learned author, two systems of courts with parallel authority cannot exist together in harmony. It is an opinion which I respectfully beg to differ. In my view, it is disrespect and meddling in each other's jurisdiction which would bring disharmony, not the mere existence of another system of courts because each court system is administering laws peculiar to itself which, with respect, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constitution, powers and jurisdictions of each court system and mutual respect is accorded by one to the other, all three can co-exist and operate within their own spheres of influence under the judicial landscape of our country. I would sum up by stating that the application for leave is dismissed with cost which has been agreed at RM500.00.

[29] On *Hj Laugan*, the learned High Court Judge, in deciding not to follow the decision of that case, said:

The grave concerns expressed by the [Supreme] Court which formed, in my respectful view, the bedrock of its decision, have been addressed by the repeal of the [Sabah Native Courts] Ordinance in 1993 [came into force on 1 April 1993]. In its place now is the [Sabah] Native Courts Enactment of 1992 which has a comprehensive and clear provisions on the breaches of customary law together with their prescribed penalties. What is more under section 11 of the Enactment, a sentence of imprisonment imposed by a Native Court must be endorsed by a Magistrate. The law, in other words, have moved with time and when *Haji Laugan*'s case is viewed against this development in the law, its ratio can no longer be applied.

Decision Of This Court

[30] In our judgment, we prefer the principle as laid down by the Supreme Court in *Hj Laugan Tarki*. With respect, we are not persuaded by the reasons given by the learned High Court Judge for not following *Hj Laugan Tarki*. The Native Courts of Sarawak are established by the State law of Sarawak (the legislation enacted pursuant to Item 13 of List IIA for the State List for

A Sabah and Sarawak of the Ninth Schedule of the Federal Constitution). They are, like the Native Courts of Sabah, *vis-à-vis* the High Court of Sabah and Sarawak, inferior tribunals. And like other inferior tribunals, the High Court may exercise control over the Native Courts through the prerogative orders. We, therefore, hold that the decision of the Native Court of Appeal of
B Sarawak is amenable to judicial review by the High Court.

[31] Accordingly, we allow the appeal but with no order as to costs. The order of the High Court is set aside. The matter is remitted to the High Court for the High Court to hear the appellant's leave application on the merits.

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